IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-179

JESSE S. LOMBARDINO,

Petitioner,

versus

LOUIS A. HEYD, JR., Criminal Sheriff,

Respondent.

On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Louis A. Heyd, Jr., prays that the judgment rendered by the United States Court of Appeals for the Fifth Circuit, affirming the judgment of the United States District Court for the Eastern District of Louisiana, dismissing petitioner's application for a writ of habeas corpus, be affirmed and that petitioner's application requesting the issuance of a writ of certiorari be denied.

QUESTIONS PRESENTED

The following questions are presented for consideration by this Honorable Court:

1. Is an application for habeas corpus, directed to alleged errors in a probation proceeding and not attacking the conviction itself, rendered moot by the subsequent release of petitioner from incarceration?

2. Is evidence seized without probable cause and without a search warrant admissible in a proceeding to revoke probation?

ARGUMENT

QUESTION 1: IS AN APPLICATION FOR HABEAS CORPUS, DIRECTED TO ALLEGED ERRORS IN A PROBATION PROCEEDING AND NOT ATTACKING THE CONVICTION ITSELF, RENDERED MOOT BY THE SUBSEQUENT RELEASE OF PETITIONER FROM INCARCERATION?

It is submitted that the instant cause is moot by virtue of the fact that petitioner recently was released on parole, which fact is admitted by petitioner in footnote 1 on page 4 of his petition for certiorari. Were the instant case concerned with a criminal conviction, the blot on petitioner's character would be sufficient to justify laying aside traditional notions of finality so as to warrant review even after termination of the imprisonment. However, petitioner's underlying criminal convictions are not at issue in the instant case.

Petitioner has failed to allege any possible adverse legal consequences that could continue to flow even after termination of the incarceration from a mere revocation of probation in Louisiana.

The cases of *Sibron* v. *New York*, 392 U.S. 40 (1968), and *Carafas* v. *LaVallee*, 391 U.S. 234 (1968), cited by petitioner, are inapplicable since there the stigma of conviction was involved. Here, the underlying convictions are unchallenged and will remain on petitioner's record regardless of the outcome of this case. The Supreme Court of the United States has not yet decided whether mere gossamer speculation of adverse consequences, not even alleged by petitioner, is sufficient to remove a case such as this from the doctrine of mootness.

Respondent suggests that the instant petition should be dismissed as moot.

QUESTION 2: IS EVIDENCE SEIZED WITHOUT PROBABLE CAUSE AND WITHOUT A SEARCH WARRANT ADMISSIBLE IN A PROCEEDING TO REVOKE PROBATION?

Respondent suggests that the Fourth Amendment exclusionary rule should not be extended to probation revocation hearings. Professor White summarizes the present state of the law:

> "Evidence obtained through an unlawful search of a parolee may be used either in a criminal trial at which a new charge is brought or in a proceeding to revoke parole. While a defendant facing a new charge will have the opportunity to exclude evidence seized in violation of the fourth amendment, a defendant facing parole revocation will probably be powerless to effect this remedy."

W. S. White, *The Fourth Amendment Rights of Parolees and Probationers,* 31 U. Pitt. L. Rev. 167, 199-200 (1969) (footnotes omitted).

Respondent agrees with petitioner that probationers are entitled to certain basic constitutional rights, including protection from illegal searches and seizures. This constitutional guarantee was followed very strictly in the case of Jesse S. Lombardino, since the trial court suppressed the evidence in question by holding that the search and seizure were illegal. However, as was found by each of the courts below, the fact that probationers are entitled to basic constitutional rights, including protection from illegal searches and seizures, does not preclude a state from revoking the probation of a defendant upon a clear showing that he has violated one of the conditions of his probation.

Petitioner relies on the case of *Mempa* v. *Rhay,* 389 U.S. 128 (1967). That case is distinguishable. In *Mempa,* the actual *sentencing* was deferred. In the instant case, the judge imposed a determinate sentence of incarceration at the time of trial. The court then suspended its sentence and placed the defendant on probation for a determinate period. The sentencing was not deferred.

Probation is not a right guaranteed to any defendant by the United States Constitution. In a sense, it is a gratuity that the defendant receives under the philosophy that rehabilitation may accomplish more for society than incarceration. However, this gratuity of necessity must carry with it certain terms and conditions

for the benefit of the probationer himself and for the protection of his fellow citizens.

In the case of *Escoe* v. *Zerbst*, this Honorable Court said:

> "Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose."
>
> *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935).

In the case of *Lanza* v. *New York*, 370 U.S. 139, 142-44 (1962), this Honorable Court held that the Fourth Amendment does not guarantee privacy to prisoners in jail. In the instant case, petitioner merely has been allowed to serve his sentence on the street rather than in a jail cell. There is no contention that the petitioner at bar was the object of police harassment.

Apposite is the logic of Justice Friedman of the California Court of Appeals:

> "Inmates of state prisons do not have the usual array of federal and state constitutional rights guaranteed to nonincarcerated citizens. ... Prison authorities may subject inmates to intense surveillance and search unimpeded by Fourth Amendment barriers. ... Although a parolee is not a prison inmate in the physical sense, he is constructively a prisoner under legal custody of the State Department of Cor-

> rections and may be returned to the prison walls without notice and hearing."
>
> *People* v. *Hernandez,* 229 Cal.App.2d 143, 40 Cal.Rptr. 100, 103 (Cal. App. 3d Dist., 1964), *cert. denied,* 381 U.S. 953 (1965) (citations omitted).

In *Coolidge* v. *New Hampshire,* this Honorable Court laid down in general terms certain guidelines for application of the Fourth Amendment exclusionary rule. Wrote Justice Stewart:

> "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption * * * that the exigencies of the situation make that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.' "
>
> *Coolidge* v. *New Hampshire,* 91 S.Ct. 2022, 2032 (June 21, 1971) (footnotes omitted).

Anent "exigencies" *see also Warden* v. *Hayden,* 387 U.S. 294 (1967); *McDonald* v. *United States,* 335 U.S. 451 (1948).

In the instant case, respondent respectfully suggests that the exigency of making available corrective assistanee render it imperative that the Fourth Amendment exclusionary rule not be extended to revocation proceedings. In the instant case, unlike *Coolidge*, the exigencies are not those presented by imminent possibility of a suspect's flight. Rather, the exigency is the administrative difficulty of clothing rehabilitative efforts with all the burdens of formal legal proceedings. Respondent suggests that to convert penologists into policemen well may spell the death of rehabilitation in America.

Chief Judge Lumbard of the Second Circuit expressed this point in his concurring opinion in *United States* v. *Fitzpatrick:*

> "As with other procedures in the correctional segment of the criminal justice system, the parole offices are overworked and inadequately funded.
>
> "The result is that both the rehabilitative and protective functions suffer from the inattention to individual parolees which must follow from a heavy caseload. ...
>
> "... To apply the exclusionary rule in the context of parole revocation hearings at the present time would merely exacerbate the problems discussed above; to import fourth amendment suppression law into this process would in fact be counterproductive. Parole officers would be forced to spend more of their time personally gathering admissible proof concerning those parolees who cannot or will

not accept rehabilitation. Time devoted to such field work necessarily detracts from time available to encourage those parolees with a sincere desire to avoid the all-too-familiar cycle of recidivism. An even greater potential loss would be in the time available to counsel and supervise — particularly in the early months — those who leave confinement with the question of rehabilitation in real doubt."

United States v. *Fitzpatrick*, 426 F.2d 1161, 1164-65 (2d Cir. 1970) (footnote omitted) (concurring opinion).

In the majority opinion in *United States* v. *Fitzpatrick*, Circuit Judge Hays said:

"Appellant contends that the Board of Parole could not use the fruits of an unlawful search and seizure as evidence to prove a violation of parole. We cannot accede to this contention and affirm the denial of appellant's petition for a writ of habeas corpus on the ground that the exclusionary rule is not applicable in a parole revocation proceeding. . . .

". . . A parole revocation proceeding is concerned not only with protecting society, but also, and most importantly, with rehabilitating and restoring to useful lives those placed in the custody of the Parole Board. To apply the exclusionary rule to parole revocation proceedings would tend to obstruct the parole system in accomplishing its remedial purposes."

United States v. *Fitzpatrick*, 426 F.2d 1161, 1163-64 (2d Cir. 1970) (footnote omitted).

See also In re Tucker, 95 Cal.Rptr. 761, 486 P.2d 657 (Cal., June 24, 1971), and the cases cited therein at 95 Cal.Rptr. 761, 764, 486 P.2d at 660.

In the instant situation, Louisiana's problem is compounded by the fact that its Legislature chose to give probationers the right to have their revocation hearing held in open court rather than before a board. Clearly Louisiana did not have to accord probationers this right. *Burns* v. *United States*, 287 U.S. 216 (1932); *Hyser* v. *Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). But Louisiana has done so. Petitioner now would have this Court tell our nation's overworked trial judges, whose dockets already are clogged to capacity, that they can save time by *not* being merciful, that they can get home sooner by *not* meting out sentences of probation, that they simply should sentence offenders to the penitentiary the first time around.

Obviously, trial judges should be encouraged to sentence defendants to probation rather than to prison. But judges are human. In states such as Louisiana, where revocation of probation requires an in-court hearing rather than a hearing before an administrative agency, it is essential that the overworked judges realize at the outset, when they initially impose sentence, that if efforts at rehabilitation fail it will be a simple matter to remand the defendant to prison with only a brief adversary hearing.

The cause of rehabilitation will suffer a serious setback indeed if petitioner in the instant case succeeds in hamstringing the revocation process. Trial judges then will have increased subconscious incentive to clear their dockets by reverting to the easy practice of sentencing defendants to the penitentiary, forgetting them, obviating the unpleasant prospect of having to meet the same defendants again in sticky and time-consuming revocation proceedings clothed in full and formal evidentiary dress.

In his concurring opinion in *Coolidge* v. *New Hampshire*, Justice Harlan wrote:

> "[I]n order to leave some room for the States to cope with their own diverse problems, there has been generated a tendency to relax federal requirements under the Fourth Amendment, which now govern state procedures as well."
>
> *Coolidge* v. *New Hampshire*, 91 S.Ct. 2022, 2050 (June 21, 1971) (concurring opinion).

In the case at bar, the State of Louisiana does not ask that federal requirements be relaxed. Rather, it is the petitioner who asks that federal requirements under the Fourth Amendment exclusionary rule be now *extended* to new areas. Petitioner in the instant case, reasoning by analogy to an automobile, would have this Court transform and elevate judicial mercy to the level of a vested right. Probation, of course, cannot be likened to an automobile, for an automobile is incapable of rehabilitation and most unsuited for

incarceration. Evidently petitioner in the instant case no longer likes the terms of the probation that he so eagerly agreed to earlier. He now asks this Honorable Court to deprive *all* criminal defendants of their freedom to agree to similar terms of probation, including evidentiary rules for revocation of probation.

Respondent suggests that the instant petition should be dismissed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Maurice R. Franks, counsel for Louis A. Heyd, Jr., Criminal Sheriff, respondent herein, hereby certify that I have this day served a copy of the foregoing Brief for Respondent in Opposition upon the following counsel for petitioner, by depositing a copy of same in the United States mails, first class postage prepaid, in a sealed envelope addressed to: Hon. Melvin L. Wulf, American Civil Liberties Union Foundation, 156 Fifth Avenue, New York, New York 10010.

This is the __ day of _____, 1971, at New Orleans, Louisiana.

_____

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State of Louisiana]
: ss.
Parish of Orleans]

Subscribed and sworn before me, this ___ day of _____, 1971, at New Orleans, Louisiana.

_____

NOTARY PUBLIC